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Charging for Environmental Information: Does Practice Match Theory?

Sean Whittaker, Colin Reid, Jonathan Mendel*

Introduction

In Scotland, members of the public and non-governmental organisations have the right to request access to environmental information held by Scottish public authorities, under the Environmental Information Scotland Regulations 2004 (EI(S)R). This empowers them to hold Scottish public authorities to account for their actions (or inaction) and to participate in environmental decision-making processes in environmental matters. However, the use of this right is not necessarily free,¹ and users of the right may be dissuaded if they are charged for environmental information. The levying of charges is meant to be transparent through the publication of fee schedules.² However, in practice Scottish public authorities do not follow their fee schedules because, contrary to what is stated in these schedules, they rarely charge for environmental information.

While this may seem like a positive development for users of the right, the fact that practice does not generally reflect the authorities' fee schedules actually has a perverse effect on users of the right. This is because the fee schedules act to misinform users on the likelihood that the authority will levy a charge for the disclosure of the environmental information. This misinformation is significant, because the gap between the fee schedules policies and the actual charging policies can deter requesters from submitting requests for environmental information. However, while this is detrimental it is important to note that this misinformation is not intentional. Rather, it is the result of conflicting interpretations of the role of fee schedules between Scottish public authorities and the Aarhus Convention.³ This in turn raises questions

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¹ Environmental Information (Scotland) Regulations 2004 SSI 2004/520, reg. 8.

² *ibid.*, reg.8(8).

³ Jonas Ebbesson, Helmut Gaugitsch, Jerzy Jendroska, Fiona Marshall and Stephan Stec, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations, 2013), 94.

on the role of fee schedules within the charging regime and how to balance the competing needs of those using the right and Scottish public authorities.

This article reveals that Scottish public authorities are not implementing in practice the fee charging policies they design and announce. The article begins by providing an overview of the right of access to environmental information in Scotland and the fee charging powers granted to Scottish public authorities before analysing the practices of Scottish public authorities in charging for environmental information. This is accomplished through identifying the fee charging schedules of particular Scottish public authorities and comparing them with the statistics gathered by the Scottish Information Commissioner on how Scottish public authorities receive and process requests for environmental information. The article then explores why this departure from the fee schedules is detrimental to individuals seeking access to environmental information, before concluding by identifying further questions raised by the findings of this research.

Fees and the Environmental Information (Scotland) Regulations 2004

The right to request access to environmental information has been guaranteed in Scotland for 26 years. The right was guaranteed by the Environmental Information Regulations 1992,⁴ which in turn were derived from EC Directive 90/313/EEC.⁵ Six years later the United Kingdom ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention),⁶ which built upon the foundations laid by Directive 90/313 and other international instruments. The binding provisions of the Aarhus Convention led to the promulgation of a new EU Directive on the right of access to environmental information⁷ and to the current EI(S)R in Scotland.

This genesis of the right is significant because the fee charging principles enshrined with the Aarhus Convention shape the EI(S)R and the guidance provided by the Scottish Information Commissioner. In setting out powers to levy fees for environmental information the Aarhus Convention embraces three parallel principles: that accessing environmental information

⁴ SI 1992/3240.

⁵ Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment [1990] OJ L158/56.

⁶ Adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

⁷ Council Directive 2003/4/EC of 28 January 2003 on Public Access to Environmental Information and repealing Directive 90/313/EEC [2003] OJ L 41/26.

should be inexpensive or free whenever possible; that fees should be used only to recoup the costs of processing the request for environmental information and that public authorities should be transparent and accountable when levying fees.⁸ These principles are implemented in the EI(S)R through the obligation imposed on public authorities to publish a fee schedule detailing how much they may charge for environmental information and circumstances where the fees may be waived.⁹

While the EI(S)R does set out the obligation for Scottish public authorities to create a fee schedule, it does not provide any additional details on what should be contained within it. This legislative gap is filled by the Scottish Information Commissioner, who has advised Scottish public authorities to adopt within their environmental fee schedules the same fee charging provisions used to calculate charges for non-environmental information under the wider freedom of information regime. Under this guidance, Scottish public authorities cannot charge for requests which cost under £100 nor can they charge for the first £100 incurred while processing a request for environmental information.¹⁰ Notwithstanding this guidance however, neither the EI(S)R nor the Scottish Information Commissioner has expressly adopted or referenced the principles which underpin fee schedules at the international level.

Significantly however, this guidance provided by the Scottish Information Commissioner is not binding. Consequently, while some public authorities have followed the advice of the Scottish Information Commissioner¹¹ many others have adopted their own fee schedules. These fee schedules vary significantly, with some Scottish public authorities setting out a policy of not charging any fees for the disclosure of environmental information.¹² Other public authorities have taken a diametrically opposite approach, setting a policy of levying

⁸ Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 3), 94.

⁹ EI(S)R (n 2), reg 8(8).

¹⁰ Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 SSI 2004/467, reg.4(2) and 4(3).

¹¹ Aberdeen City Council, “Freedom of Information Standard Charges”

<<https://www.aberdeencity.gov.uk/services/council-and-democracy/freedom-information/access-information/how-make-request-information/freedom-information-standard-charges>> accessed 02/12/18.

¹² Scottish Natural Heritage, “Freedom of Information Requests” <<https://www.nature.scot/about-snh/access-information-and-services/access-information/freedom-information-requests>> accessed 02/12/18.

charges on every request for environmental information.¹³ Critically, because the advice of the Scottish Information Commissioner is not binding, each of these different fee schedules is allowed under the EI(S)R.

This wide variation between how public authorities design their fee schedules is problematic for two reasons. First, the variance between the different fee schedules has created an uneven fee charging system across Scotland, with those in certain geographic areas having to pay more than those in other areas to access similar information. This acts to create unequal opportunities for access to environmental information, and consequently participation in environmental decision-making procedures. Second, this variance between Scottish public authorities can raise obstacles in planning “round-robin” requests¹⁴ as the different authorities can charge different amounts for the same environmental information. Regardless whether the motivation behind these requests is acting in the public interest or for personal reasons, this variation between Scottish public authorities can disrupt how individuals use their right to access environmental information. In this way, the different fee schedules implemented by Scottish public authorities create obstacles for individuals seeking to utilise their right to access environmental information.

Charges and Fee Schedules in Practice

In addition to the variability in practice of fee schedules adopted by Scottish public authorities, there is also an issue with the divergence between how fee schedules are designed and how they are actually implemented in practice. The actual use of the fee charging powers by Scottish public authorities is important because the act of charging fees can become an obstacle to requesters accessing environmental information.¹⁵ Perversely however, the decision to not charge fees for the disclosure of environmental information can also create an obstacle to accessing environmental information where this decision does not match the authority’s fee schedule. The divergence between the authorities’ fee schedules and their actual fee charging practices is significant because the misinformation can potentially deter

¹³ The City of Edinburgh Council, “Environmental Information: Explanation of Costs” <http://www.edinburgh.gov.uk/downloads/file/1869/environmental_information_explanation_of_costs> accessed 02/12/18.

¹⁴ A “round-robin” request is where the same request is sent to multiple public authorities.

¹⁵ Jacques Paradissis, “The Issue of Cost in Accessing Environmental Information” (2006) *Journal of Planning and Environmental Law* 1643, 1643. See also Scottish Information Commissioner Decision Notice 89/2017: *Q and Aberdeen City Council*.

requesters from utilising the right to access environmental information. Perhaps more fundamentally, this willingness to not charge fees despite being contrary to the published fee schedule also calls into question the role of fee schedules and fees themselves in how the right is guaranteed in Scotland.

The use of fee schedules in Scotland can be explored through the statistics gathered and made publicly available by the Scottish Information Commissioner on the implementation of the EI(S)R in Scotland. These publicly available statistics date from January 2013 to the third quarter of 2018¹⁶ and provide empirical data on how Scottish public authorities process requests and levy charges for environmental information. It is important to highlight that the Commissioner's statistics do not indicate the actual rate of the fees levied, so they cannot be used to determine the "average" cost of obtaining access to environmental information.

Nevertheless, these statistics are interesting because they reveal that the actual charging practices of Scottish public authorities deviate significantly from what they themselves prescribe in their fee schedules. Contrary to the widespread policy of charging for requests for environmental information, in practice Scottish public authorities rarely charge for access to environmental information.¹⁷ While this is expected for Scottish public authorities that explicitly state that they will not charge for environmental information,¹⁸ it is surprising to note that this is also the case for authorities that expressly assert the discretionary power to levy charges. This finding is particularly unexpected for public authorities which have reserved an unlimited right to levy fees because their fee schedule seems to indicate a conscious decision to levy charges on all environmental information requests.

This departure from the fee-charging policies set out by authorities in their fee schedules is significant because it both positively and negatively impacts on how requesters utilise their right to environmental information. One benefit of public authorities not levying charges in the majority of instances is that members of the public are unlikely to be dissuaded from accessing environmental information due to financial barriers. Indeed, if the general practice

¹⁶ Scottish Information Commissioner, "Statistics Reports" <<https://stats.itspublicknowledge.info/>> accessed 02/12/18.

¹⁷ An exception to this is Glasgow City Council, which levies charges on a significantly greater proportion of requests than any other Scottish public authority.

¹⁸ Such as Scottish Natural Heritage.

of Scottish public authorities is to disclose environmental information without levying a charge then it matches the accessibility principles enshrined in the Aarhus Convention.

However, a significant problem with the practical application of this “no charge” policy is that it stands in direct contrast with the position stated in their fee schedules. Indeed, the majority of fee schedules in Scotland indicate that the relevant public authority will charge for environmental information despite this not being the case in practice. This is problematic as it is misinforming individuals who wish to submit a request as to the likelihood of having to pay fees for the environmental information. Potential requesters may be dissuaded from submitting a request because of the potential for significant charges despite the general (but undisclosed) practice of public authorities to waive charges for environmental information. Consequently, the differences between the stated and actual fee charging policies of Scottish public authorities acts to obfuscate how fees are levied and hinders how individuals utilise their right to access environmental information.

Further, this finding also calls into the question the purpose of fee schedules in Scotland. Fee schedules are intended to provide an accurate reflection of how Scottish public authorities levy charges for environmental information.¹⁹ Yet the majority of schedules adopted by Scottish public authorities misrepresent how often fees are actually levied, to the detriment of the public. Informal discussions with public authorities have highlighted that many view the fee schedule as a means of reserving their legal rights to charge under the EI(S)R.²⁰ In practice, this means that Scottish public authorities use fee schedules to “stake-out” the maximum amounts that they can charge in instances where a requester submits a request for a large amount of environmental information. Public authorities have also highlighted that in order to not inhibit how the right is used they have an informal practice of waiving small fees²¹ contrary to the policies set out in their fee schedules.

Significantly, the differences between the authorities’ fee schedules and their actual charging practices indicate a fundamental divergence between the intended role of fee schedules and how that role has been interpreted by Scottish public authorities. While fee schedules are intended to act as an outward facing announcement on how charges are to be levied, Scottish public authorities internally view fee schedules as an assertion of their legal position. In this

¹⁹ Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 3), 94.

²⁰ These discussions took place at the Information Requests Network Meeting on 30 August 2018.

²¹ “Small fees” refer to fees that are under £100.

way Scottish public authorities are not intentionally disseminating incorrect information. Rather, the function of the information within the fee schedule is being interpreted differently by different groups depending on how they view the role of fee schedules under the EI(S)R.

However, it must be noted that the interpretation applied by the majority of Scottish public authorities is not justified by the normative provisions of the Aarhus Convention. The Convention clearly states that the role of the fee schedule is to inform the requester about how fees are levied and empower them to hold the public authority to account when they use their fee levying powers.²² As such, because the public authority has adopted a different interpretation of the fee schedule's role they unintentionally misinform the public as to their true fee charging practices. In turn, this can substantially hinder how the public utilises their right to access environmental information.

Conclusion

As a result of these issues, the way in which Scottish public authorities currently levy a charge for environmental information and implement their fee schedules inadequately reflects the fee-charging principles underlying the Aarhus Convention. This divergence between theory and practice is critical because it introduces the possibility of individuals being unnecessarily deterred from making requests for environmental information. In turn, this disempowers the public from becoming more informed on environmental matters and undermines the participative aims of the right. These practical issues are clearly problematic, but the divergence between the intended use of fee schedules and their actual use raises questions on the nature of the charging regime and use of fee schedules under the EI(S)R.

The first question this analysis raises is what is the purpose of the publishing fee schedules of Scottish public authorities? Under the Aarhus Convention fee schedules are intended to act as a source of information for requesters in order to assist in the submission of requests and to hold public authorities to account. However, because the charging practices of Scottish public authorities often do not match their fee schedules, the public is being misinformed as to how Scottish public authorities levy charges for environmental information. Instead, fee schedules are currently being used to reserve the legal power to levy fees, protecting the authority against being exposed to large financial costs if fulfilling the obligation to provide information results in significant expense. This is problematic because it conflicts with the

²² Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 3), 94.

schedules' intended informative purpose. The second, and perhaps more fundamental, question this analysis raises is whether the needs of those using the right and Scottish public authorities are actually in conflict with one another. In the majority of instances it appears that both users and Scottish public authorities do not wish for charges to be levied on environmental information. While the reasoning underlying this shared view is likely different between the two groups, this shared view is interesting because it contrasts with the expected division between users and public authorities regarding fees enshrined in the Aarhus Convention.

Notwithstanding this positive development however, it is clear that because the majority of fee schedules do not reflect this complementary relationship the practice of not charging perversely undermines how the right is implemented. This suggests that substantial reform is required. While it may be possible to reform how public authorities set out and levy charges, a more compelling argument may be made for abolishing the power to charge for environmental information entirely. The fundamental idea behind such a proposal is that the economic benefits of having an informed population outweigh the economic burdens of having to process requests for environmental information. Indeed, since Scottish public authorities rarely use their powers to charge for environmental information in practice abolishing these powers is unlikely to impact on their day-to-day running.

A counter-argument to this radical proposal is that this may lead to problems for Scottish public authorities in instances where they are obliged to process and disclose a substantial amount of environmental information. Such an argument does have some merit, because Scottish public authorities may be justified in levying charges where individuals request significant amounts of environmental information. This, in addition to the exceptional nature of any charges being levied, may suggest that different reforms may be more suitable. Regardless of what position is adopted however, it is clear that the current fee levying regime fails to adhere to the underlying principles enshrined in the Aarhus Convention. Further, the current regime acts to misinform the public as to the true cost of using the right and acts to inhibit how the public can make use of their right to access environmental information. These failings undermine the effective implementation and use of the right in Scotland and, ultimately, harm the environment in which we live.